

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
NEBRASKA

MICHAEL FERGIN, and ACE AMERICAN
INSURANCE CO,

Plaintiffs,

vs.

WESTROCK COMPANY, MAGNUM LTL,
INC., XPO, and MAGNUM DEDICATED,
INC.,

Defendants.

8:16CV26

**ORDER ON JOINT
PROTECTIVE ORDER**

THIS MATTER COMES BEFORE THE COURT on the Parties' Joint Proposed Protective Order. Specifically, the Parties have indicated that they agree that during the course of discovery it may be necessary to disclose certain confidential information relating to the subject matter of this action. They agree that certain categories of such information should be treated as confidential, protected from disclosure outside this litigation, and used only for purposes of prosecuting or defending this action and any appeals. The parties have, therefore, jointly requested entry of this proposed Protective Order to limit the disclosure, dissemination, and use of certain identified categories of confidential information. Protection of the identified categories of confidential information is necessary because confidential information may need to be disclosed during the course of discovery for this case. For good cause shown, this Court GRANTS the Motion for Protective Order ([Filing No. 103](#)) and hereby enters the following Protective Order:

1. Scope. All documents and materials produced in the course of discovery of this case, including initial disclosures, responses to discovery requests, all deposition testimony and exhibits, and information derived directly therefrom (hereinafter collectively "documents"), are subject to this Order concerning Confidential Information as set forth below. As there is a presumption in favor of open and public judicial proceedings in the courts, this Order will be strictly construed in favor of public disclosure and open

proceedings wherever possible.

2. Definition of Confidential Information. As used in this Order, “Confidential Information” is defined as information that qualifies for protection under Fed. R. Civ. P. 26(c)(1)(G) and that the producing party designates in good faith and has been previously maintained in a confidential manner and should be protected from disclosure and use outside the litigation because its disclosure and use is restricted by statute or could potentially cause harm to the interests of the disclosing party or nonparties. As used in this Order, Confidential Information designated as CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER falls within one or more of the following categories:

- a) proprietary, competitive or commercially sensitive business information deemed confidential by a Party;
- b) information that contains or reveals trade secrets;
- c) technical, commercial or financial information that the Party has maintained as confidential;
- d) financial information that is generally unavailable to the public;
- e) personal identity information including social security numbers, dates of birth or other identifying information;
- f) personnel or employment records of a person;
- g) state and federal income tax returns (including attachments);
- h) information relating to customers and vendors, including identities, terms, pricing information and transactional histories;
- i) information relating to business practices.

Information or documents that are available to the public may not be designated as Confidential Information.

3. Form and Timing of Designation. The producing party may designate documents as containing Confidential Information and therefore subject to protection under this Order by marking or placing the words CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER (hereinafter “the marking”) on the document and on all copies in a manner that will not interfere with the legibility of the document. The designating party shall designate for protection only those parts of material, documents, items, or oral or written communications that qualify so that other portions of the material, documents,

items, or communications for which protection is not warranted are not included within the designation. As used in this Order, copies include electronic images, duplicates, extracts, summaries or descriptions that contain the Confidential Information. The marking will be applied prior to or at the time the documents are produced or disclosed. Applying the marking to a document does not mean that the document has any status or protection by statute or otherwise except to the extent and for the purposes of this Order. Copies that are made of any designated documents must also bear the marking, except that indices, electronic databases, or lists of documents that do not contain substantial portions or images of the text of marked documents and do not otherwise disclose the substance of the Confidential Information are not required to be marked. By marking a designated document as **Confidential** Information, the designating attorney thereby certifies that the document contains **confidential** Information as defined in this Order.

4. Inadvertent Failure to Designate. Inadvertent failure to designate any document or material as containing Confidential Information will not constitute a waiver of an otherwise valid claim of confidentiality pursuant to this Order, so long as a claim of confidentiality is asserted within 30 days after discovery of the inadvertent failure.

5. Depositions. Deposition testimony will be deemed confidential only if designated as such when the deposition is taken or within a reasonable time period after receipt of the deposition transcript. Such designation must be specific as to the portions of the transcript and/or any exhibits to be protected.

6. Protection of Confidential Information.

(a) General Protections. Designated Confidential Information must be used or disclosed solely for purposes of prosecuting or defending this lawsuit, including any appeals or any other related legal proceeding brought by one of the parties to this litigation.

(b) Who May View Designated Confidential Information. Except with the prior written consent of the designating party or prior order of the court, designated Confidential Information may be disclosed only to the following persons:

- (1) The parties to this litigation, including any employees, agents, and representatives of the parties;

- (2) Counsel for the parties and employees and agents of counsel;
- (3) The court and court personnel, including any special master appointed by the court, and members of the jury;
- (4) Court reporters, recorders, and videographers engaged for depositions;
- (5) Any mediator appointed by the court or jointly selected by the parties;
- (6) Any expert witness, outside consultant, or investigator retained specifically in connection with this litigation, but only after such persons have completed the certification contained in Attachment A, Acknowledgment and Agreement to be Bound;
- (7) Any potential, anticipated, or actual fact witness and his or her counsel, but only to the extent such confidential documents or information will assist the witness in recalling, relating, or explaining facts or in testifying, and only after such persons have completed the certification contained in Attachment A;
- (8) Any witness whose deposition is taken during the course of discovery in this case, provided that:
 - (i) Such confidential documents or information are presented to the witness only during the course of the deposition;
 - (ii) Such confidential documents and information are necessary to assist the witness in recalling, relating, or explaining facts or testimony;
 - (iii) Such witness is not permitted to retain a copy of any document identified as Confidential Information under this Order; and
 - (iv) If such witness refuses to execute the certification contained in Attachment A, such witness is provided a copy of this Order on the record of such deposition;
- (9) The author or recipient of the document (not including a person who received the document in the course of the litigation);
- (10) Independent providers of document reproduction, electronic

discovery, or other litigation services retained or employed specifically in connection with this litigation; and

- (11) Other persons only upon consent of the producing party and on such conditions as the parties may agree.

(c) **Control of Documents.** The parties must take reasonable efforts to prevent unauthorized or inadvertent disclosure of documents designated as containing Confidential Information pursuant to the terms of this Order. Counsel for the parties must maintain a record of those persons given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order.

7. Filing of Confidential Information. In the event a party seeks to file with the court any document containing Confidential Information subject to protection under this Order, that party must take appropriate action to ensure that the document receives proper protection from public disclosure including: (a) filing a redacted document with the consent of the party who designated the document as confidential; (b) where appropriate (e.g., in relation to discovery and evidentiary motions), submitting the document solely for in camera review; or (c) when the preceding measures are inadequate, seeking permission to file the document under seal by filing a motion for leave to file under seal in accordance with Local Rule 5(c).

Nothing in this Order will be construed as a prior directive to allow any document to be filed under seal. The parties understand that the requested documents may be filed under seal only with the permission of the court after proper motion. If the motion is granted and the requesting party is permitted to file the requested documents under seal, only counsel of record and unrepresented parties will have access to the sealed documents.

8. Challenges to a Confidential Designation. The designation of any material or document as Confidential Information is subject to challenge by any party at any time. Unless a prompt challenge to a designating party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed. Before filing any motion or objection to a Confidential

Information designation, the objecting party must meet and confer in good faith to resolve the objection informally without judicial intervention. A party that elects to challenge a Confidential Information designation may file and serve a motion that identifies the challenged material and sets forth in detail the basis for the challenge. The burden of proving the necessity of a Confidential Information designation remains with the party asserting confidentiality. Until the court rules on the challenge, all parties must continue to treat the materials as Confidential Information under the terms of this Order.

9. Use of Confidential Documents or Information at Trial or Hearing.

Nothing in this Order will be construed to affect the use of any document, material, or information at any trial or hearing subject to the Nebraska Rules of Evidence. A party that intends to present or that anticipates that another party may present Confidential Information at a hearing or trial must bring that issue to the attention of the court and the other parties without disclosing the Confidential Information. The court may thereafter make such orders as are necessary to govern the use of such documents or information at the hearing or trial.

10. Obligations on Conclusion of Litigation.

(a) **Order Remains in Effect.** Unless otherwise agreed or ordered, all provisions of this Order will remain in effect and continue to be binding after conclusion of the litigation.

(b) **Return of Confidential Documents.** Within 30 days after this litigation concludes by settlement, final judgment, or final order, including all appeals, all documents designated as containing Confidential Information, including copies as defined above, must be returned to the party who previously produced the document unless: (1) the document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction of the document to the extent practicable in lieu of return; or (3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certifies to the producing party that it has done so. If the parties agree to the destruction of the confidential documents, opposing counsel must certify, in writing, that the documents have been destroyed.

(c) **Retention of Work Product.** Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product, including an index which refers or relates to designated Confidential Information, so long as that work product does not duplicate verbatim substantial portions of the text or images of designated documents. This work product will continue to be confidential under this Order. An attorney may use his or her own work product in subsequent litigation provided that its use does not disclose Confidential Information.

11. Order Subject to Modification. This Order is subject to modification by the court on its own motion or on motion of any party or any other person with standing concerning the subject matter. The Order must not, however, be modified until the parties have been given notice and an opportunity to be heard on the proposed modification.

12. No Prior Judicial Determination. This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing in this Order will be construed or presented as a judicial determination that any document or material designated as Confidential Information by counsel or the parties is entitled to protection until such time as the court may rule on a specific document or issue.

13. Persons Bound by Protective Order. This Order will take effect when entered and is binding upon all counsel of record and their law firms, the parties, and persons made subject to this Order by its terms.

14. Jurisdiction. The court's jurisdiction to enforce the provisions of this Order will terminate on the final disposition of this case. But a party may file a motion to seek leave to reopen the case to enforce the provisions of this Order.

15. Applicability to Parties Later Joined. If additional persons or entities become parties to this lawsuit, they must not be given access to any Confidential Information until they execute and file with the court their written agreement to be bound by the provisions of this Order.

16. Protections Extended to Third-Party's Confidential Information. The parties agree to extend the provisions of this Protective Order to Confidential Information produced in this case by third parties, if timely requested by the third party.

17. Confidential Information Subpoenaed or Ordered Produced in Other Litigation. If a receiving party is served with a subpoena or an order issued in other litigation that would compel disclosure of any material or document designated in this action as Confidential Information, the receiving party must so notify the designating party, in writing, immediately and in no event more than three business days after receiving the subpoena or order. Such notification must include a copy of the subpoena or court order.

The receiving party also must immediately inform in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is the subject of this Order. In addition, the receiving party must deliver a copy of this Order promptly to the party in the other action that caused the subpoena to issue.

The purpose of imposing these duties is to alert the interested persons to the existence of this Order and to afford the designating party in this case an opportunity to try to protect its Confidential Information in the court from which the subpoena or order issued. The designating party bears the burden and the expense of seeking protection in that court of its Confidential Information, and nothing in these provisions should be construed as authorizing or encouraging a receiving party in this action to disobey a lawful directive from another court. The obligations set forth in this paragraph remain in effect while a party has in its possession, custody, or control Confidential Information by another party to this case.

IT IS SO ORDERED.

Dated this 1st day of September, 2017.

BY THE COURT:

**s/ Michael D. Nelson
United States Magistrate Judge**